SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 977

SIDNEY R. WRIGHT, *Petitioner*,

v.

STATE OF WASHINGTON, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION

Of Counsel:
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Spokane, Washington

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES	1
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	1
ARGUMENT	
1. Question 1	1
2. Question 2	6
CONCLUSION	8

AUTHORITIES

CASES

Beatty v. U. S., 377 F. 2d 181 (CCA 5, 1967)	4
Dancy v. United States, 390 F. 2d 370 (CCA 5, 1968)	4
Ellis v. Dixon, N.Y. 1955, 75 S. Ct. 850, 349 U. S. 458, 99 L. Ed. 1231, rehearing denied 76 S. Ct. 37, 350 U. S. 855, 100 L. Ed. 759	6
Good v. U. S., 378 F. 2d 934 (CCA 9, 1967)	8
Hester v. United States, 265 U. S. 57, 68 L. Ed. 898, 44 S. Ct. 445 (1924)	3
Hoffa v. U. S., 385 U. S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966)	2

CASES – Continued

Page

Janney v. U. S., 206 F. 2d 601 (CCA 4, 1953) 3

Katz v. United States, 389 U. S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) 4, 5

Long v. United States, 387 F. 2d 377 (CCA 5, 1967) 4

Lopez v. United States, 373 U. S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963) 3

McClure v. U. S., 332 F. 2d 19 (CCA 9, 1964) 8

Monnette v. U. S., 299 F. 2d 847, (CCA 5, 1962) 3

On Lee v. United States, 343 U. S. 747, 72 S. Ct. 967, 96 L. Ed. 1270 (1952) 4

Osborn v. United States, 385 U. S. 323, 87 S. Ct. 429, 17 L. Ed. 2d 394 (1966) 4

Rathbun v. U. S., 355 U. S. 107, 2 L. Ed. 134, 78 S. Ct. 161 8

Rogers v. U. S., 369 F. 2d 944, 946 (CCA 10, 1966) 8

U. S. v. Buchner, 164 F. Supp. 836, (DDC, 1958) 3

U. S. ex. rel. Dixon v. Pate, 330 F. 2d 126 (CCA 7, 1964) 7

U. S. v. Zarkin, 250 F. Supp. 728 (DDC, 1966) 7

United States v. Kaufer, January 14, 1969 (CCA 2) 5

United States v. Laughlin, 226 F. Supp. 112 (DDC, 1964) 6

CONSTITUTION AND STATUTES

Page

FOURTH AMENDMENT, UNITED STATES CONSTITUTION 1, 5

47 U. S. C. Section 605 ..... 6, 8

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BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent accepts the statements of the Petitioner as to the OPINION BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED, QUESTIONS PRESENTED, and STATEMENT OF THE CASE.

ARGUMENT

1. Neither the electronic transmitting nor the electronic receiving of conversations between the police informant and the petitioner were in violation of the Fourth Amendment, United States Constitution.

The facts of this case clearly show that the doctrine of "misplaced confidence" established by *Hoffa v. U. S.*, 385 U.S. 293, 17 L.Ed. 2d 374, 87 S.Ct. 408 (1966) should apply. Herein, the petitioner was conducting the business of an abortionist from his home. The police had information that he had performed an abortion on one Sandra Murray and they then obtained the services of the informant, who should more properly be called an agent, in order to arrest the petitioner while he was attempting an abortion. The police equipped the agent with an electronic transmitting device so that they might by the aid of an electronic receiving device listen to the conversations between the agent and the petitioner when she went to his home (Tr. 76). The officers were also able to record the transmission.

The agent called the petitioner on two different occasions by telephone at which time the conversations were monitored and recorded by the police (Tr. 74). Argument concerning this matter will be covered in the next section. At the time of these conversations the agent was told to come to the home of the petitioner so that the abortion might be explained (Tr. 75).

The petitioner engaged in conversations with the agent which were overheard by means of the electronic devices on two occasions. The first time, in the afternoon of the date in question, the agent proceeded to the home of the petitioner so that he could explain what the operation would involve (Tr. 27). On the second occasion, the petitioner was in the act of preparing to perform the abortion when

the police entered the home and made the arrest (Tr. 35).

It should be noted relative to the issue of the alleged trespass by the officers in the driveway of the petitioner, that this alleged trespass took place only on the second visit of the agent to the home (Tr. 188). The officers had earlier heard preparations being made and explanations being given to the agent. They thus had cause to believe when the agent entered the home of the petitioner for the second time, and prior to the time that they heard any further conversations between the agent and the petitioner, that an abortion was about to be attempted. Therefore, their technical trespass on the driveway of the petitioner in order to provide them with a more advantageous listening post was not sufficient to invalidate the arrest. If the electronic transmitting of the conversations from within the home was not in violation of the Fourth Amendment because under the "misplaced confidence" doctrine and therefore neither a search nor seizure, could the technical trespass void the information obtained thereby? The cases since *Hester v. United States*, 265 U.S. 57, 68 L.Ed. 898, 44 S.Ct. 445 (1924), first announcing the "open fields" doctrine have held that it would not. *Janney v. U. S.*, 206 F.2d 601 (CCA 4, 1953); *U. S. v. Buchner*, 164 F.Supp. 836 (DDC, 1958); *Monnette v. U. S.*, 299 F.2d 847 (CCA 5, 1962).

The petitioner unwisely misplaced his confidence in the agent, which of course he had to do in order to commit an abortion upon her, thinking that she was there for that purpose. The case then is similar to *Lopez v. United States*,

373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed. 2d 462 (1963) and *Osborn v United States,* 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed. 2d 394 (1966) wherein conversations were tape recorded by informants. This case is in accord with *On Lee v. United States,* 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952) wherein a policeman listened to a conversation being broadcast by means of a transmitter.

The petitioner contends, however, that *Katz v. United States,* 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967) required a holding that in the case at bar the evidence was seized in violation of the Fourth Amendment. The respondent contends otherwise, on the basis that the case at bar involves no "uninvited ear" such as was involved in the Katz case. Herein, the petitioner told the agent what he so desired, not knowing that she was an agent of the police, and that his conversation with her was being transmitted to them. Her ear was invited. Unfortunately for the petitioner she was transmitting to others outside of his home. The respondent contends that the Katz case would have been decided differently had there been the consent of one of the parties to the overhearing or recording of the conversation involved in that case.

In accord with this line of reasoning are the following cases holding that there is continued viability to *On Lee, Lopez* and *Osborn, supra. Dancy v. United States,* 390 F.2d 370 (CCA 5, 1968); *Long v. United States,* 387 F.2d 377 (CCA 5, 1967); *Beatty v. U. S.,* 377 F.2d 181 (CCA 5, 1967).

Recently in *United States v. Kaufer*, January 14, 1969 (CCA 2), the court in distinguishing the Katz case from the facts there in issue, similar to those in the case at bar, stated:

> "Katz v. United States has no application to this case. Katz involved electronic surveillance performed without the knowledge of any of the participants in the intercepted conversation. The procedure used against Kaufer involved the recording of a conversation with the consent of one of the parties to that conversation, a procedure upheld in Lopez v. United States, 373 U.S. 427 (1963). A recording here, as distinguished from that in Katz, merely serves to preserve the consenting participant's recollection. * * *
>
> "The risk that an unknown third party will intercept and record the conversation as was done in Katz, is obviously of a far different order. The cases are thus clearly distinguishable, and it cannot be said, as appellant urges, that Lopez has been overruled, sub silentio, by Katz."

As stated in the concurring opinion by Mr. Justice White in *Katz, supra,* in a footnote at 88 S.Ct. 517:

> ". . . When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa v. United States, supra.* It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another."

Hence, the electronic transmitting and receiving of the conversations between the petitioner and the police agent were not in violation of the Fourth Amendment.

2. The electronic monitoring and recording of a telephone conversation between the petitioner and the police informer was not in violation of Section 605, Federal Communications Act, nor was the consent of the police informer to the monitoring and recording of said conversations given involuntarily.

The court's attention should be called to the fact that this alleged error was not raised upon the appeal to the Washington State Supreme Court. The petitioner is attempting to raise for the first time in this court the issue presented without having given the Washington State Supreme Court the opportunity to pass upon it. Therefore, the question should not be considered by this court. *Ellis v. Dixon*, N.Y. 1955, 75 S.Ct. 850, 349 U.S. 458, 99 L.Ed. 1231, rehearing denied 76 S.Ct. 37, 350 U.S. 855, 100 L.Ed. 759.

Should the court consider this question, it should be noted that nowhere did the petitioner establish at the trial court level that the witness Singleton, the police informer, was involuntarily consenting to the monitoring or recording of the conversations on the telephone. Mrs. Singleton did testify that she was on bond on a charge at the time of her co-operation and hoped that the aid that she rendered would be helpful to her, but at no time did she testify that she was threatened concerning what would occur if she did not co-operate as in the case of *United States v. Laughlin*, 226 F.Supp. 112 (DDC, 1964), cited by the petitioner.

In *U. S. v. Zarkin*, 250 F.Supp. 728 (DDC, 1966), the informant was out on bond awaiting trial when he agreed to assist the police, hoping that he might lessen his sentence. He allowed the police to monitor his telephone calls to the defendant. The court stated in that case at 250 F.Supp. 737:

> "We can think of no time in which a party to a telephone conversation would permit the police to intercept that conversation when he, himself, would not seek something from the police in return, assuming he is of sound mind and knows the police are police. He might merely be seeking police protection from threatening phone calls. Or, he might be an undercover policeman who seeks his pay check. Or, indeed, he may be seeking leniency. However, so long as pressure is not initiated by the police for the purposes of overbearing the will of the party, this Court does not believe that the authorization given by the party is involuntary."

See also *U. S. ex. rel. Dixon v. Pate*, 330 F.2d. 126 (CCA 7, 1964), wherein the court said at page 128:

> "Petitioner earnestly argues that there was no consent by Mrs. Nitti that this telephone conversation be overheard. He emphasizes her position as a narcotics addict in the custody of the police, and asserts that, under those circumstances, she had no choice in the matter as to whether or not she would make the telephone call; and that, therefore, there was no consent by either party that the conversation be overheard. Adherence to that theory would require us to assume facts which are not proved, inasmuch as there is no suggestion of record that coercive practices were employed against Mrs. Nitti. We may assume that the police suggested that the call be made, but that fact standing alone does not negative consent. We will not attach a condition for the disclosure of the content of telephone communications made by a person

> while in the custody of the police that such person must have volunteered to make the call before it can be found and held that he had consented that his conversation might be overheard by the police."

Accord: *Good v. U. S.*, 378 F.2d. 934 (CCA 9, 1967), and *McClure v. U. S.*, 332 F.2d. 19 (CCA 9, 1964).

It follows that if the informer voluntarily allowed the police to monitor and record the telephone conversations between herself and the petitioner there was the required "authorization of the sender" under Section 605, Federal Communications Act. The connection of a device to the telephone has been held not to be an "interception" within the meaning of Section 605. *Rogers v. U. S.*, 369 F.2d. 944, 946 (CCA 10, 1966). Therefore, the situation is no different than allowing the police to listen to a telephone conversation by means of an extension phone which was held permissible in *Rathbun v. U. S.*, 355 U.S. 107, 2 L.Ed. 134 78 S.Ct. 161.

Hence, the monitoring and recording of telephone conversations between the police informer and the petitioner did not violate 47 U.S.C. Section 605.

CONCLUSION

The decision of the Washington State Supreme Court was correct on all the above matters and hence the petition should be denied. Moreover, the petitioner has not in any of his argument raised any substantial constitutional question of importance which would warrant granting the petition. Therefore, the respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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